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Summary record of the 745th meeting
Held at Headquarters, New York, on Thursday, 20 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-43429 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Article 10. Duty of confidentiality (continued)

1. **The Chairman** invited the Commission to resume consideration of article 10, which had been left pending.

2. **Mr. Kovar** (United States of America) said that the title, "Duty of confidentiality", implied liability if confidentiality were breached, particularly when coupled with the very general definition of conciliation provided under article 1, paragraph (2). His delegation thus wished to propose a compromise solution that would reconcile his delegation's own concerns in respect of domestic implementation under common law with the Commission's desire to maintain strong confidentiality language. The words "Duty of" would be deleted, reflecting the title of article 14 of the UNCITRAL Conciliation Rules, and the following paragraph would be inserted in the Draft Guide to Enactment (A/CN.9/514):

> "It is the intent of the drafters that in the event a court or other tribunal is considering an allegation that a person did not comply with article 10, it should include in its consideration any evidence of conduct of the parties that shows whether they had, or did not have, an understanding that a conciliation existed and consequently an expectation of confidentiality. A State that enacts the Model Law may wish to clarify article 10 to reflect this interpretation."

3. **The Chairman**, urging the Commission to consider the proposal in a spirit of flexibility, said that it was traditional practice for it to seek imaginative solutions when a State expressed grave concern as to the acceptability of a provision within its national law.

4. **Mr. Marsh** (United Kingdom), after expressing overall support for the modifications proposed by the United States representative, said that he would be in favour of deletion of the final sentence, which appeared to suggest that the Model Law as drafted did not clearly reflect the intention of the drafters.

5. **Mr. Lebedev** (Russian Federation) said that his delegation was ready to accept the proposed change to the title, on the understanding that the conciliator and the parties were obliged to keep the conciliation proceedings confidential. It was indeed important to ensure that the result of the Commission's work was acceptable to a variety of legal systems, which was why he supported the text proposed for inclusion in the draft Guide. It was also important to retain the final sentence of that text, which merely indicated to enacting States that the matter might require further clarification.

6. **Mr. Möller** (Observer for Finland), said that his delegation fully supported the proposed modifications and favoured retention of the final sentence, which could serve a useful purpose for certain States.

7. **Mr. Morán Bovio** (Spain), joining with the previous two speakers, said that his delegation unreservedly supported the United States proposal. The sentence in question should be retained for inclusion in the Guide, since it clarified the lack of unanimity on the issue within the Commission and alerted States to importance of dealing carefully with the precept.

8. **Mr. García Feraud** (Observer for Ecuador) said that he supported the change in title, but was concerned that the proposed paragraph, as currently worded, might go beyond the proper purview of a model law. Since it was clearly aimed at arbitrators or judges who might be called upon to consider an act of breaking the obligation of confidentiality, it concerned procedures governed by other normative systems.

9. **Ms. Moosa** (Singapore) said that she had no objection in principle to the proposal. The proposed text befitted the Guide, its intention being to draw the attention of States to the possible ramifications of the provision.

10. **Mr. Shimizu** (Japan) said that although his delegation had no objection to the proposal and welcomed the accommodating spirit in which it had been made, further clarification would be appreciated. Since the problem raised by the United States representative was evidently related to the broad definition of conciliation under article 1, the proposed text could be said to be applicable whenever there was a question of whether conciliation had taken place.

11. **Ms. Renfors** (Sweden) welcomed the fact that the text was being proposed for inclusion in the Guide, not the Model Law itself. In the hope of accommodating the concerns expressed by the representative of the United Kingdom and the Observer for Finland, her delegation wished to propose a modification of the final sentence as follows: "When enacting the Model Law, certain States may wish to clarify article 10 to reflect this interpretation."

12. **Mr. Kovar** (United States of America) said that he had no objection to the modification proposed by the previous speaker. With regard to the question raised by the representative of Japan, his delegation had in fact suggested in connection with article 1, paragraph (2), that the Guide should include a reference to clarifying the circumstances in which a conciliation would be deemed to have existed. It felt particularly strongly that the point should be re-emphasized in respect of article 10.

13. **Ms. Brelier** (France) proposed that the title of article 10 should read "Confidentiality of conciliation".

14. **The Chairman** said he took it that there was no objection to the revision of the title of article 10 as proposed by the United States representative and modified by the representative of France and that the Commission also agreed to include the text proposed by the United States representative in the draft Guide, as modified by the representative of Sweden. In the same article, the words "Unless otherwise" would be retained since there had been an objection to their deletion.

15. *It was so decided.*

Draft article 14. Resort to arbitral or judicial proceedings

16. **Mr. Graham** (Mexico), referring to paragraph (2), proposed that the words "in its sole discretion" should be deleted to ensure that the initiation of arbitral or judicial proceedings was governed by objective criteria alone and that the protection provided in paragraph (1) was not rendered ineffective.

17. **Mr. Kovar** (United States of America) said that it was unclear whether the party must comply with the court order. Revision of the standard contained in article 16 of the UNCITRAL Conciliation Rules had inadvertently given rise to ambiguity by creating such a strong juxtaposition between the rights of the parties on the one hand, and, on the other hand, the role of the court or tribunal in enforcing the terms of an agreement to conciliate. The conflict between the two paragraphs would be eliminated if they were joined into one paragraph and the words "A party may nevertheless initiate arbitral or judicial proceedings where, in its sole discretion, it considers such proceedings necessary" were replaced with the following formulation: "except to the extent necessary for a party, in its opinion". Such a modification might also address the concern raised by the previous speaker.

18. **Mr. Jacquet** (France) asked whether the first sentence of paragraph (2) could be understood as targeting juridical proceedings on the basis of a provisional or protective measure.

19. Alongside the rule that conciliators could not be arbitrators and the rule that conciliation must be confidential, the article under consideration embodied one of the most important principles at stake in the Model Law, namely that conciliation was incompatible with arbitral or judicial proceedings. It was regrettable that the rule was thus being presented in a truncated version. The original version (A/CN.9/506, para. 124) had contained an additional first paragraph to elucidate the general principle, but that paragraph had been deleted on the spurious grounds that it was "too broadly stated". Since the article could not be fully understood without the deleted text, his delegation was in favour of reinstatement of the original first sentence, namely: "During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation."

20. As the article currently stood, no response was provided to the question of what was to be decided when parties had agreed to conciliate but had *not* expressly undertaken not to initiate arbitral or judicial proceedings during a specified period of time. Judges — to whom article 14 was surely also addressed — would currently not find a response to the question of whether to declare themselves competent when a party in a conciliation turned to the courts. That question could not be left wholly unanswered in the Model Law. The original first sentence had provided the principle required by States in order to determine to what extent the conciliation should be recognized and turned over to domestic jurisdiction. Without that sentence, the provision risked being used in a curiously

regressive manner that would be contrary to the UNCITRAL Conciliation Rules and to most of the conciliation rules in force in the world.

21. **Mr. Sekolec** (Secretary of the Commission), responding to the question of the delegation of France, said that the philosophy of the earlier draft had been to have the Model Law recognize an agreement (if such an agreement existed) between the parties in conciliation not to initiate arbitral or judicial proceedings. In that respect, the Model Law did not seek to protect the parties from themselves. Once the parties had actually embarked on conciliation, the circumstances under which arbitral or judicial proceedings could be initiated were different.

22. **Mr. Lebedev** (Russian Federation), referring to the United States proposal to merge paragraphs (1) and (2) of draft article 14, asked whether the changes to the wording of that provision would include deleting the last sentence of paragraph (2), as that would mean that after agreeing not to start arbitral or judicial proceedings, any party initiating such proceedings could be deemed not to have ended its agreement to engage in conciliation or to have terminated the conciliation proceedings.

23. **Mr. Sillapamahabundit** (Thailand) said that the phrase "until the terms of the undertaking have been complied with" in the last sentence of draft article 14, paragraph (1), worried his delegation, as it appeared to be tantamount to suspending the jurisdiction of a court. That agreement was an agreement between the parties to the conciliation proceedings, and was an obligation on them, not on a court or arbitral tribunal. He favoured the wording used in article 16 of the UNCITRAL Conciliation Rules.

24. **Mr. Morán Bovio** (Spain) said that three separate issues had been raised in connection with draft article 14. First was the concern of the representative of Mexico to make paragraph (2) less subjective by removing the phrase "in its sole discretion", a proposal which his delegation felt uncomfortable with because of the difficulty of achieving complete objectivity. Second was the suggestion of the United States delegation to merge paragraphs (1) and (2), which he had not fully understood and called for a further explanation of. Third was the proposal of the French delegation to return to a text which the Working Group had since changed, on which he saw little need for action on the grounds that other similar agreements posed no problems. He urged those issues to be considered separately to avoid neglecting any of them.

25. **Mr. Kovar** (United States of America) agreed with the previous speaker that the three issues should be dealt with separately. With regard to the first issue, raised by the delegation of Mexico, he said that he agreed with the representative of Spain that complete objectivity would be impossible to achieve. With regard to the second issue, his own delegation's proposal, he responded to the question from the delegation of the Russian Federation by pointing out that the intention was not to change the substance of the existing text, but merely to reduce what seemed according to that text to be a conflict between the obligation of a court or arbitral tribunal to enforce any undertaking by the parties not to take arbitral or judicial action, and the right of a party to take arbitral or judicial action to preserve its rights. In his view, having separate paragraphs (1) and (2) reinforced that perceived conflict, while merging them reduced it. The last sentence of paragraph (2) was unaffected by the proposed amendment.

26. With regard to the third issue, raised by the delegation of France, he said that the Working Group had thoroughly discussed the wording covering resort to arbitral or judicial proceedings and had seen no reason to include a separate obligation on the parties not to start judicial or arbitral action if they had not specifically agreed to refrain from doing so in advance.

27. **Mr. Heger** (Germany) said that the French proposal had surprised him in the light of the discussion of the Chinese proposal regarding the reinstatement of article 16 of the draft Model Law (A/CN.9/SR.744), where it had been regularly argued that the draft Model Law was regulating conciliation rather than arbitration or court action. In spite of that assertion, draft article 14 seemed to be targeting exactly that sphere.

28. **Mr. Talpis** (North American Free Trade Agreement Article 2022 Advisory Committee), referring to the French proposal, pointed out that parties were unlikely to elect to use conciliation in an international dispute unless there was a legal framework for such conciliation which excluded competing procedures, wherever the latter might take place. That was a provision commonly found in arbitration agreements. Draft article 14, paragraph (1), seemed to ensure the enforcement of the agreement to

engage in conciliation, but perhaps did not go far enough in doing so, as enforcement depended upon the parties having agreed not to initiate judicial or arbitral proceedings for a certain period or until after a particular event had taken place. To guarantee enforceability, parties would have to bear in mind the need for such an express condition, and agree on its content.

29. In practice, however, agreements to enter into conciliation were not always negotiated by lawyers and did not always contain such conditions. As a result, draft article 14 appeared to leave the fate of those agreements' intent in the hands of national laws: they might be enforceable in one country, but not in another. He asked the Commission to consider adding to draft article 14, paragraph (1), or to the Guide, wording to the effect that even without such conditions, judicial or arbitral authorities' proceedings would be stayed until after a good-faith attempt at settlement had been made.

30. **Mr. Graham** (Mexico) said he wished to clarify the reason for his delegation's suggestion that the phrase "in its sole discretion" should be removed from draft article 14, paragraph (2). Doing so would provide an interval during which judicial or arbitral proceedings could not be started. That was significant in view of the fact that in some jurisdictions, Mexico included, judicial proceedings were difficult to initiate, because they required the case to be thoroughly prepared. The risk was that a party contemplating such proceedings would spend time preparing them, rather than giving conciliation a chance to work. Removing the reference to "sole discretion" would emphasize that good reasons had to exist to initiate such proceedings.

31. **Mr. Markus** (Observer for Switzerland) said he had several comments deriving from the question of the French delegation. First, in his view, paragraph (2) allowed a party which thought it needed to preserve its own rights to initiate interim measures of protection or any other proceeding short of full court proceedings. In fact, in many legal systems, such interim measures were expected to lead on to actual court proceedings within a particular period of time, failing which the interim measures would lapse.

32. Second, he favoured retaining some degree of subjectivity in the right to initiate judicial or arbitral proceedings, and therefore supported the proposal of the United States delegation to specify that a party's decision to do so would reflect its own assessment of the situation (through the phrase "in its opinion").

33. Third, his desire to retain some subjectivity in a party's decision to begin judicial or arbitral proceedings stemmed from the possibility that one party in a conciliation proceeding might halt progress simply by remaining passive, leaving the other party with no alternative but to launch such proceedings. He proposed that that eventuality be added to the list of circumstances in paragraph 76 of the draft Guide that might require arbitral or judicial proceedings to be started.

34. Fourth, with regard to the French proposal to block arbitral or judicial proceedings even when the parties had made no express agreement to refrain from them, he thought that such a far-reaching step was risky, because it had implications that might even affect constitutional rights in countries where such rights included entitlement to access to the courts.

35. **The Chairman** said that a number of issues had been raised, but no clear opinion was emerging. He proposed to suspend the meeting for consultations.

The meeting was suspended at 11.35 a.m. and resumed at 12.15 p.m.

36. **Mr. Möller** (Observer for Finland) said he had several comments on draft article 14. First, regarding the remarks of the German delegation that the article was out of place in a Model Law that dealt with conciliation, he disagreed: the provision was in fact necessary. Second, with regard to the comments by the delegation of France, he considered the reference to an express undertaking not to initiate arbitral or judicial proceedings in paragraph (1) to be necessary, as the Working Group had decided. Third, regarding the drafting change proposed by the United States delegation, he thought that it introduced a clear improvement. Adding the phrase "in its opinion" reflected the wording of article 16 of the UNCITRAL Conciliation Rules. Fourth, with regard to the risk referred to by the Observer for Switzerland that one party might stall the conciliation proceedings by remaining passive, forcing the other party to take arbitral or judicial action, he said that the solution lay in draft article 12; the undertaking not to start judicial or arbitral proceedings was closely interlinked with the agreement to engage in conciliation.

37. **Mr. Sekolec** (Secretary of the Commission) said that he did not want to interrupt the discussion under way, but that the secretariat had received a question regarding the draft Model Law from the construction industry, where clauses in contracts often provided that for a predetermined period after a dispute arose, the parties would attempt to resolve that dispute with an engineer. During that proscription period, the parties would not take judicial action except to apply for interim measures of protection. The industry had asked whether draft article 14 in its current form invalidated such clauses. The secretariat had replied that it did.

38. **Mr. Holtzmann** (United States of America) said that, while the secretariat's response to the construction industry had been correct, such a contract would constitute a variation of the law under article 3. As for draft article 14, paragraph (2), his delegation preferred the phrase "in its opinion" to "in its sole discretion"; in any case, some such phrase was necessary for the practical reason that a Court's determination as to whether it was necessary for a party in conciliation to bring a lawsuit near the end of the limitation period could be both time-consuming and unpredictable. In order to forestall abandonment by that party and ensure the continuation of the conciliation proceedings, the parties' rights must be preserved. The wording proposed by his delegation did not change the substance of the Working Group's draft, and he was pleased that delegations considered it an improvement.

39. While the French proposal was interesting, his delegation, regretfully, could not support it. His delegation believed that, ultimately, party autonomy, was the best policy: both parties must be fully cognizant of what they were undertaking and there must be no "traps for the unwary" in any portion of the text. That could best be achieved through an agreement.

40. **Ms. Renfors** (Sweden) said she supported the principle of party autonomy but felt that the broadly formulated text of draft article 14 at once upheld and impeded it by giving the parties latitude to deviate from the agreement and institute judicial proceedings. Perhaps a clarification in the draft Guide to Enactment would be sufficient to resolve the contradiction. Her delegation preferred the phrase "in its opinion" precisely because it allowed less room for deviation.

41. She also wondered how article 14 was supposed to operate in relation to article 3. Since article 14 was not mentioned in article 3, the parties could agree that article 14 should not apply. Some clarification was needed.

42. **Mr. García Feraud** (Observer for Ecuador) expressed full support for the Mexican proposal. While parties in the conciliation should be able to preserve their rights, any language that was discretionary or subjective, or which relaxed the parties' obligation to abide strictly by the law, should be deleted in order to maintain objectivity. Hence, the first sentence of paragraph (2) should read: "A party may nevertheless initiate arbitral or judicial proceedings where such proceedings are necessary to preserve its rights."

43. In the interest of ensuring the continuation of the conciliation proceedings, the emphasis should be less on the parties' right to abandon such proceedings through an express declaration than on restricting their latitude to initiate arbitral or judicial proceedings. He recalled the Commission's decision not to incorporate article X on suspension of limitation period as a feature of the draft Model Law but rather to relegate it to a footnote, and its judgement that the need for such a suspension must be clearly demonstrated. In that context, the Mexican proposal became extremely relevant.

44. The representative of Sweden had a sound basis for questioning the relationship between article 14 and article 3. He believed that article 14 should be mentioned in article 3.

45. **Mr. Marsh** (United Kingdom) expressed strong support for the inclusion of subjective language, in the draft article and endorsed the United States formulation "in its opinion". It had to be assumed that the term "necessary [to preserve its rights]" applied to both matters of law and commercial judgement, and the latter could only be exercised subjectively. His delegation very much hoped that one effect of the Model Law would be to encourage businesspeople not only to engage in conciliation but also to include conciliation clauses in contracts. However, if the impact of doing so would mean sacrificing their decision-making power over what was commercially necessary, that would act as a disincentive.

46. **Mr. Tang** Houzhi (China) said that the paragraph as currently drafted should remain intact; it was very comprehensive and reflected a wide range of views. He saw no major difference between "in its sole discretion" and "in its opinion", except, perhaps, that

the former afforded the parties slightly more latitude. If necessary, either of those phrases could be deleted, since the criteria for recourse to arbitral or judicial proceedings were very complex and a determination could not be made subjectively. However, he believed that a decision by the parties themselves as to the appropriateness of instituting arbitral or judicial proceedings to preserve their rights was not necessarily a violation of the conciliation agreement, and that, in initiating such proceedings, they were not necessarily waiving the conciliation agreement or terminating the conciliation proceedings.

47. **Mr. Cosman** (Canada) said that his delegation supported the United States amendment to draft article 14, which provided useful clarifying language while maintaining the substance of the original text.

48. **Mr. Barsy** (Sudan) said that his delegation supported the formulation "in its sole discretion", although it had no strong objection to "in its opinion" and saw the value of both expressions. He wondered what the United States position would be if arbitral or judicial proceedings were not necessary to preserve a party's rights and the other party could adduce evidence to that effect. If a court or arbitral tribunal applied paragraph (1) of draft article 14, the conciliation agreement would not be implemented and the party that had initiated the proceedings would bear the consequences. He also wished to ascertain whether arbitral or judicial proceedings would continue simultaneously with the conciliation proceedings once a party's rights had been preserved since, in his delegation's view, they would be necessary in view of their relation to the conciliation agreement.

49. **The Chairman** noted the general support for the Working Group's draft, with the amendment proposed by the United States, which did not alter the substance of the Working Group proposal but rather clarified it. He said that the relationship between articles 3 and 14 could be considered when the Commission reviewed the entire text of the draft Model Law. Concerns regarding the relationship between the Model Law and the conciliation laws of individual states could be addressed in the draft Guide to Enactment.

50. **Mr. Jacquet** (France) said that, if there were no longer any obstacles to instituting arbitral or court proceedings — save express agreement by the parties — all the subtlety of paragraph (2) would be for naught. That would create a substantive problem that would be extremely damaging to the draft Model Law and would not resolve most of the practical difficulties that could arise. The only substantive argument he had heard against his delegation's original proposal was the need for party autonomy highlighted by the United States delegation and the possibility that the parties in the conciliation could fall into a trap. Ironically, the greatest trap was the article itself, as currently drafted, which led the parties to believe that they were protected from court proceedings when they actually were not.

51. His delegation, too, supported party autonomy; however, it had to be applied properly and only in very specific circumstances. He failed to understand how, in the name of "party autonomy", the Commission could forgo a sound rule that could be tempered, if necessary if necessary, by party autonomy, and leave the parties without any protection against arbitral or judicial proceedings. His delegation would like to see a reference to party autonomy included in the title of the article, which would then be tempered by paragraph (1) as currently drafted, the parties' option to end the conciliation proceedings, and paragraph (2), regardless of its final formulation.

52. **The Chairman** said that consideration would be given to the French proposal if time allowed and that, if not, the views of the representative of France would be reflected in the report of the Commission.

The meeting rose at 1.05 p.m.